

4DD Holdings, LLC v. USA

10/4/2017

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1 P R O C E E D I N G S

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3 (Proceedings start mid-recording, 1:56 p.m.)

4 THE COURT: Tell me what you understand the
5 status quo to be in terms of production from anybody that
6 you have sent a subpoena to.

7 MR. O'BEIRNE: That's a long list, Your Honor.

8 THE COURT: Is it?

9 MR. O'BEIRNE: So I can certainly start with
10 the ones that we have the most information about. You're
11 familiar, obviously, with the SMS subpoena back and forth
12 because there's been some motions practice about that.
13 We have received some documents from other nonparty
14 contractors. ICS-Nett produced a small amount of
15 documents.

16 Fulcrum -- there's a handful of other names,
17 Your Honor, that may not mean much to you because they
18 haven't figured prominently either in the volume or they
19 were not the main contractors in the case.

20 Deloitte has produced nothing and has indicated
21 they have nothing, which obviously we believe is not
22 consistent with the --

23 THE COURT: What was their role?

24 MR. O'BEIRNE: They were developing one aspect
25 of the software, Your Honor, the viewer that would allow

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1 you to actually look at these electronic records and
2 interact with them. That married up and received
3 information from the databases that were being
4 facilitated by TETRA. We understand that they had access
5 to the SMS environment, to the Government's testing
6 centers, and there's even an email from a Deloitte
7 employee to a 4DD employee saying, hey, I understand
8 we're using TETRA, can you tell me more about it, we've
9 been downloading it, and the respondent said, what do you
10 mean. And they said, oh, well, never mind.

11 So we've got four Deloitte emails in the
12 Government's production extensively CC'ed on
13 communications regarding the project and at least a
14 handful of communications directly with 4DD about the
15 interaction of their role developing the JLV, the joint
16 legacy viewer, and how it would fit into the system that
17 the Government was developing in the project. And,
18 again, they've indicated they have no responsive
19 documents.

20 THE COURT: All right. Others?

21 MR. O'BEIRNE: We're continuing to communicate,
22 Your Honor, with some additional nonparties who had not
23 responded and we're following up to see if their response
24 was -- or their failure to respond was because they're
25 taking the position they don't have documents or that

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1 they -- you know, for example, MITRE has asked us to
2 narrow the search terms. It's unclear to what extent
3 they're going to produce responsive documents. Some
4 contractors -- some that you're familiar with, Your
5 Honor, have said that they gave the documents back to the
6 Government, that they were working with
7 government-furnished equipment and government emails and,
8 therefore, the Government would be in possession.

9 So that's been an aspect that we're trying to
10 negotiate as to what extent would there be documents
11 still in the possession of these parties, such as SMS,
12 who were using their own emails and had their own systems
13 and to what extent were parties only using
14 government-furnished equipment. And that's something
15 we've been, you know, digging into and trying to get our
16 arms around.

17 THE COURT: This is rather basic and not
18 related to the current issue, but in terms of TETRA as a
19 software, is it currently still in use? Is it still
20 being marketed, sold, used?

21 MR. O'BEIRNE: You mean in general, Your
22 Honor?

23 THE COURT: Mm-hmm.

24 MR. O'BEIRNE: In the marketplace to other
25 people? Absolutely, the company still actively uses the

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1 software in its projects and is developing uses for
2 commercial purposes in a variety of fields.

3 THE COURT: All right. Let me leave it there
4 for a minute and let's talk about the Government's
5 position. The -- I tried to extract, I guess, on the
6 motion to compel, and categorize the Government's
7 defenses to it and I've come up with the following. A,
8 nonconsultation. Are we past that?

9 MR. TODOR: We spoke with the Plaintiffs
10 yesterday and so we did consult -- you know, they asked
11 for the documents from other contractors, so that was the
12 ground we raised for nonconsultation. The motions today
13 did do that.

14 I would also note I asked them in our
15 conversation yesterday, please name the prime contractors
16 that you're asking us to get documents from. They named
17 the three that were in their motion, SMS, Deloitte and
18 MITRE. They named two others, Axiom and I believe ICS-
19 Nett. They said there may be others, they didn't -- they
20 weren't sure. So as we sit here, we're still not sure
21 what third parties the Plaintiffs are asking us request
22 documents from under respective contracts. Those
23 contracts may have different terms. Some may be active,
24 some may be inactive. There may be different defenses
25 or --

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1 THE COURT: Well, with respect to --

2 MR. TODOR: -- you know, some who might do it.

3 THE COURT: -- with respect to the five that
4 you did know about, what's the status of those? Are you
5 asking?

6 MR. TODOR: My understanding is SMS, Deloitte,
7 MITRE -- well, the contracts they attached are expired.
8 MITRE, I believe, has a number of different government
9 contracts. Some of those may be active. They haven't
10 pointed us to a data retention one with respect to the
11 DTC Richmond project, in particular.

12 We need to research further to determine
13 whether there are active contracts for Deloitte or MITRE
14 other than the ones that they attached to their motion to
15 compel. Those ones, you know, appear on their face to be
16 expired. But we don't know whether there are other
17 active ones for those contractors or whether those would
18 have specified some kind of document retention with
19 respect to this kind of document and that's --

20 THE COURT: Well, let me make sure I
21 understand --

22 MR. TODOR: -- that's our understanding on
23 that.

24 THE COURT: You're familiar with, I gather,
25 four or five of the subs. SMS, Deloitte, MITRE, ICS,

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1 what else?

2 MR. TODOR: Axiom I believe is the other one
3 they named. Those were not subcontractors; those were
4 prime contractors.

5 THE COURT: All right, primes, whatever. Are
6 you telling me that if you had the names, you would go
7 approach these people and say, give us what you've got?

8 MR. TODOR: We determined whether there was an
9 active contract with some kind of document, you know,
10 production requirement. And in that case, we would. At
11 this point, we haven't seen that.

12 THE COURT: Well, let's talk about that.
13 Active contracts. Is it your position that if a contract
14 is no longer active, the prime contractor has no
15 obligation to respond to discovery requests initiated by
16 the Government?

17 MR. TODOR: Well, in this case, this is not a
18 discovery request initiated by the Government, so we
19 would be perfectly within our rights to issue a Rule 45
20 subpoena to a third party contractor if it's contract had
21 expired just like the Plaintiffs are able to. So that's
22 a discovery request. Our understanding is that
23 Plaintiffs are not asking us to make a discovery request;
24 they're asking us to -- as part of the Government's
25 response to their Plaintiff's discovery request, invoke a

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1 contract term that would have had some kind of document
2 production required as a part of it. So in response to
3 the Court's question --

4 THE COURT: What's the practical difference?

5 MR. TODOR: In terms of the practical
6 difference, the Court's question was about did the third
7 party have a responsibility to respond to a discovery
8 request. Yes.

9 THE COURT: I'm not talking about discovery
10 requests by the Plaintiff to a third party directly; I'm
11 talking about a discovery request to the Government where
12 the Government has a right, by contract, to obtain
13 material from a contract -- a contractor.

14 MR. TODOR: If the contract is expired, our
15 position is then the third party would not have
16 responsibility to produce to the Government in response
17 to the -- a discovery request issued to the Government
18 unless there's some provision in the contract that would
19 go beyond the expiration of the contract that would call
20 for that.

21 THE COURT: Well, let me disabuse you of that
22 one. I've read the three, I guess, contract provisions.
23 I don't see anything that prohibits the Government from
24 asking. And when a contract says this material belongs
25 to the Government, then, in my view, the expiration of

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1 the contract doesn't end that obligation or the
2 contractor to respond to government requests for
3 information.

4 MR. TODOR: Mm-hmm. Then if I could turn to
5 our understanding of that clause as well, our
6 understanding is the ownership clause, which is meant to
7 deal with intellectual property rights, was limited by
8 its term to documents that were furnished by the
9 contractor, and those contracts have a list of
10 deliverables listed in the contract. The SMS one does.
11 The MITRE contract referred to it as a contract data, I
12 believe, receivables list.

13 Those are specified in the contract. Those are
14 what are supposed to be furnished by the contractor. It
15 is our understanding that those would be required to be
16 furnished by the contractor during the term of the
17 contract and then, you know, the Government would have
18 those in our records and presumably we should have turned
19 them over to Plaintiffs already.

20 THE COURT: Well, I've read -- I guess the
21 contract provisions are a little different, but I read
22 them considerably more broadly than that. I don't think
23 it's limited to intellectual property produced by the
24 contractor for the Government. I think the Government's
25 rights under the contracts that I have are much broader

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1 than that, including the right to inspect the work, have
2 access to, make a copy of the above-mentioned items
3 which, at some point, include software, digital files,
4 data, everything produced under the contract by the
5 contractor.

6 And we need to talk about precisely what the
7 Plaintiff's question is. But if the question is, for
8 example, do you have, have you ever used TETRA in
9 furtherance of this contract, I think the Government has
10 a right to demand that information.

11 MR. TODOR: Okay. Our understanding was -- and
12 if the Court disagrees, then we understand -- we have the
13 right to demand all of those things during the time of
14 the contract. Now, the contract --

15 THE COURT: Well, we just talked about that.

16 MR. TODOR: -- is expired, so our
17 interpretation was we no longer would have the right to
18 demand that then our ownership of items was limited to
19 items that we actually demanded during the term of the
20 contract.

21 THE COURT: I disagree. I don't -- the
22 contract doesn't contain that exclusion and I'm not
23 reading the contract -- all three of them that I've seen
24 can't be read that way. And I think the Government has a
25 perfect right to insist on after the expiration of the

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1 contract anything that it could have asked for during a
2 contract. I mean, it paid for that. And so if you're
3 telling me the Government has not asked the question
4 whether or not, for example, TETRA was used or any
5 versions of it exist because the contract is expired,
6 that's not a legitimate reason not to ask the question.

7 MR. TODOR: Well, at this point, we have not,
8 you know, made the request of third party contractors.
9 We -- what we did was we viewed our own files and
10 produced documents in our records, including those that,
11 you know, would have been delivered by the third parties
12 during the term of the contract. But we have not sent
13 requests to the third parties to produce their -- any
14 files they have related to their work on the project. We
15 did also have an issue with the payment, since that could
16 be considered a service, and with these contracts being
17 expired, again, we don't have a mechanism in place for
18 payment if the third parties are going to demand payment.
19 If the Court's interpretation is that there would be no
20 payment due and this is part of the contract duties, then
21 please advise us of that.

22 THE COURT: I don't want to be too flip about
23 it, but my initial reaction is I don't care. The
24 Government -- if it has access to that information, the
25 Government has to produce it. And if that means the

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1 Government pays for it, then the Government pays for it.
2 And if the contract allows the Government to ask for it
3 and doesn't make payment provisions, that's between you
4 and the contractor. But the Plaintiff is entitled to
5 access to that information if you have the legal right to
6 ask of it -- of the contractor. So I'm expecting that to
7 be produced.

8 MR. TODOR: I understand, Your Honor.

9 THE COURT: The fact that the -- the defense
10 about whether this is repetitive of efforts to get the
11 same thing from third parties, I mean, at some point that
12 might be relevant under different circumstances, but it's
13 not here, given what you're telling me about not even
14 asking the same information that obviously Plaintiff was
15 looking for from these contractors and the fact that the
16 Government asked me to put in place a protective order
17 which left me with the distinct impression that these
18 materials were being produced by third parties to the
19 Government for the Government's review, as if it had the
20 right to ask for them and the right to control them. In
21 any event, the fact that the Plaintiff may have asked
22 successfully or not for these materials from third
23 parties for the time being is not controlling. You have
24 a discovery request in front of you and I'm expecting the
25 Government to honor it.

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1 MR. TODOR: I understand, Your Honor. May I
2 clarify a couple points?

3 THE COURT: Sure.

4 MR. TODOR: First, with respect to the third
5 parties for both contractors and subcontractors, my --
6 you know, we -- I checked the agency when the lawsuit was
7 filed and when discovery requests were made, we informed
8 the third party contractors, both prime contractors and
9 subcontractors of the lawsuit and the litigation hold
10 placed in place to advise them of their responsibilities
11 that they face in response to third party subpoenas.
12 However, we did not solicit the documents from the third
13 parties for the Government's response. We did inform
14 them of the lawsuit and inform them of the litigation
15 hold.

16 With respect -- the Court made reference to the
17 protective order and I believe the Court made a statement
18 that the documents were produced to the Government for
19 the Government's review. The way the protective order of
20 January 30th (inaudible) structured, the parties actually
21 produced them to Plaintiffs. They were placed under an
22 attorneys' eyes only designation and the Government was
23 given an opportunity to review and to make designations
24 of documents at a higher confidentiality level if it
25 chose to do so. But the Government was not receiving the

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1 documents from the third parties and producing the -- the
2 Plaintiffs had been getting them directly from the third
3 parties.

4 THE COURT: Or not, as in the case of some of
5 these folks, who indicate that they think -- is it ICS
6 that said we view this as subject to the Government's
7 control?

8 MR. TODOR: Yes, that would be the document the
9 Plaintiff's attached. We also attached the response from
10 the agency counsel stating that we cannot advise them on
11 their responsibilities. And Plaintiffs actually attached
12 ICS documents to their motion to compel, so apparently
13 they have been getting them from ICS.

14 THE COURT: Right. Privileged documents, there
15 -- am I right in thinking about 13,000 have been
16 designated as privileged?

17 MR. TODOR: As attorneys' eyes only
18 designations, not as attorney/client or work product
19 privilege.

20 THE COURT: So in other words, these have been
21 turned over?

22 MR. TODOR: Yes.

23 THE COURT: They're simply stamped "attorneys'
24 eyes only?'

25 MR. TODOR: Correct.

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1 THE COURT: Okay.

2 MR. TODOR: We also produced our privilege log
3 to Plaintiffs separate from that, which lists the
4 documents we've -- for which we've made a privilege claim
5 which have not been produced to Plaintiffs.

6 THE COURT: With respect to what the Government
7 is going to be asking contractors, the Government -- it's
8 obviously virtually impossible for me to dissect contract
9 by contract what the Government's rights are with respect
10 to data held by third parties.

11 I think Mr. Todor is correct that the mere fact
12 of a discovery request to the Government does not
13 translate into -- automatically into "and produce
14 everything responsive to the Plaintiff's discovery
15 request." That third party, when we're using the
16 Government as a conduit for that material, I think the
17 Government's only entitled to ask what the contract
18 required the third party to maintain or produce or keep
19 for the Government's inspection.

20 So how -- do we need to negotiate what that
21 looks like? I mean, how does Mr. Todor know what to
22 demand of the third parties in any given case?

23 MR. O'BEIRNE: Your Honor --

24 THE COURT: If it's something less extensive
25 than anything relevant to this lawsuit.

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1 MR. O'BEIRNE: To the extent that we're taking
2 the broadest standing requests, our RFPs to the
3 Government, we think that there are certainly RFPs
4 included in the list that the Government already has that
5 are core key contract documents about the use of
6 software, about the project, et cetera, that plainly fall
7 within the broad ownership rights as Your Honor was
8 describing.

9 If you think this is a workable solution, we
10 would be happy to highlight in our current existing RFPs
11 what we think are plainly contemplated by the contracts
12 and would likely be in the possession of these
13 contractors. If the Government wants to then say the
14 following requests we think would be outside, we can try
15 to meet and confer about that, Your Honor.

16 But we don't -- we think to the extent that the
17 Court's going to order them to go get documents that we
18 believe they have, we believe full well within these
19 contracts and we think are clearly contemplated by a core
20 set of our RFPs, we don't want to get in the way of that
21 by looking for every single one of however many are
22 standing. So we are happy to meet and confer with the
23 Government in order to officially proceed with them
24 getting and producing documents in their possession,
25 custody and control.

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1 THE COURT: You don't have a motion to compel
2 in front of me with respect to third parties, do you?

3 MR. O'BEIRNE: Not pending, no, Your Honor.

4 THE COURT: Okay. We can go back over the list
5 of elements of the motion to compel. Well, I'll ask
6 Plaintiff, what defenses, arguments, issues have I not
7 alluded to on the motion to compel?

8 MR. O'BEIRNE: Your Honor, I think your ruling
9 that the Government does have the contractual right to
10 obtain -- although we would obviously argue that's not
11 even necessary, a practical ability is sufficient. But
12 to demonstrate a contractual right to obtain the
13 documents, render them within their possession, custody
14 and control and indicate they should go get them. And to
15 the extent Your Honor is not entertaining the burden
16 argument for the reasons you stated on the record, I
17 think that addresses the relief we're asking for, Your
18 Honor. We've mentioned several of the most prominent
19 contractors, SMS, Deloitte, MITRE, ICS. Axiom is
20 another, as we've indicated in our discussion with Mr.
21 Todor.

22 So, again, we would be happy to meet -- if Your
23 Honor would give an order rendering relief -- the relief
24 we requested, we would be happy to meet and confer with
25 the Government on the contractors we're requesting they

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1 reach out to and the RFPs we believe there would be
2 responsive documents to.

3 THE COURT: Mm-hmm. Well, the problem I have
4 with a clean ruling on the motion to compel is all I can
5 do is sort of dispose of arguments against it rather than
6 craft a paragraph that says the Government has to produce
7 X. That's the problem I'm having. So I'll take you at
8 your word you all can negotiate that.

9 The motion to compel as to SMS is moot, right?
10 It was denied as moot?

11 MR. O'BEIRNE: Well, Your Honor, it was denied
12 in part. There was, obviously, nonparty discovery to
13 compel SMS and they had drawn a line between
14 authorization and consent and the broader documents,
15 which is not a bifurcation that exists for party
16 discovery and that's one of the main reasons why we
17 wanted to obtain the documents from the Government,
18 because they're in their possession, custody and
19 control.

20 So I believe, Your Honor, that you left open
21 the possibility that we could revisit relief against SMS
22 if the discovery that was produced indicated there would
23 be more responsive documents than they were indicating
24 that they had because, at some point, they -- SMS
25 represented to the Court that this was all they had. In

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1 our review, we think that there would clearly be more.
2 So we certainly anticipate continuing to raise the issue
3 of what documents might need to be compelled from SMS.
4 But, obviously, if the Government is going to obtain the
5 documents through party discovery, then we can deal with
6 that as it remains necessary.

7 THE COURT: With respect to the -- you alluded
8 to the issue about bifurcation or not. I think that may
9 have been a confusion that I brought into the case myself
10 a long time ago at a point when we had -- when we still
11 had the Government's motion to dismiss on jurisdictional
12 grounds or failure to state a claim because of -- is that
13 what it is? Lack of authority?

14 MR. TODOR: Yes.

15 THE COURT: All right.

16 MR. TODOR: And the Court issued the discovery
17 plan in July of 2016 with the schedule through the two
18 issues.

19 THE COURT: We had -- the issues were separated
20 chronology. In other words, discovery on -- the first
21 motion to dismiss question was going to end early, but
22 the other would still be ongoing?

23 MR. TODOR: Yes, Your Honor. On pages 10 and
24 11 of our motion, in Footnote 5, we quoted the language
25 from the discovery plan and this was part of our

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1 objection on the SMS motion to compel, which is -- the
2 Court -- the discovery plan says if the Court denies the
3 Government's motion to dismiss, the parties will have
4 four months from the date of the Court's order to
5 complete any additional discovery on liability for the
6 alleged unauthorized copy in the SMS lab/environment. As
7 we said in our motion --

8 THE COURT: Was your motion to -- was your
9 motion to dismiss partial?

10 MR. TODOR: It was partial insofar as it was
11 only on the SMS environment, not on the DTC, the
12 Government environment, because the issue in the motion
13 to dismiss was whether the Government had given
14 authorization and consent for SMS if SMS did unauthorized
15 copying in its environment, had the Government given
16 authorization and consent for SMS to do that. That was
17 the basis for the motion to dismiss.

18 THE COURT: But was SMS the -- is it the
19 primary or only relevant player in response to morphing
20 additional versions of this software?

21 MR. TODOR: They were the prime for development
22 in their environment. There were many other contractors
23 who work in the DTC environment. Primarily, ICS-Nett was
24 the one doing the work. There was a contractor, American
25 Systems, contracting the facility itself. There was

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1 another prime, Favor Consulting, under which MicroHealth
2 was a sub for program management. So there were several
3 contractors working in the DTC environment. SMS was a
4 prime and had its own environment where it was doing its
5 own thing.

6 THE COURT: All right. You want to take a shot
7 at answering that?

8 MR. O'BEIRNE: Yeah, sure, Your Honor. We take
9 issue with that characterization of how the work was
10 actually being performed on the project. From the
11 documents that we've seen, there seems to have been
12 constant interworking between the Government and various
13 contractors and SMS, both in what was occurring in the
14 DTC and potentially the work that was doing on in SMS's
15 lab. As we indicated, Deloitte was developing a
16 component of the software and we've seen numerous
17 communications where SMS was communicating with the
18 Government about work that was going on in the lab,
19 CC'ing other contractors with various related parts of
20 the project.

21 So it's a very sophisticated, complex software
22 development and logistics project, Your Honor, but we
23 don't believe it's as clean as that SMS was just working
24 away in their lab and they're the only ones with
25 visibility or access to or responsibility for the work

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1 that was going on there and that other work was being
2 done by the Government and other contractors outside the
3 lab. It was much more fluid and overlapping than that
4 based on the documents we've managed to review -- obtain.

5 THE COURT: Are you saying that replication, if
6 any, beyond what Plaintiff licensed, could have been done
7 by others beside SMS?

8 MR. O'BEIRNE: Absolutely, Your Honor.
9 Absolutely. SMS was working with virtual environments,
10 with virtual machines that could be cloned, saved, put on
11 an external drive and moved someplace else and we're
12 continuing to dive into the record to determine to what
13 extent, for example, when they were moving environments
14 from the SMS lab to some other location, the DTC or
15 elsewhere, they were then standing up these same virtual
16 machines other places. So the nature of how the
17 technology operates allows for any number of people --
18 there's remote access. Right.

19 If you're not located in the SMS lab, that you
20 have access to it through a remote desktop. You can
21 remote it and, you know, work on virtual environments
22 that are present in the SMS lab. We've -- the Government
23 referenced some of the contractors that were working in
24 the DTC, KSJ is another contractor that had a -- they
25 were staging and moving these environments in different

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1 places, Your Honor. We think that involved any number of
2 contractors other than SMS.

3 THE COURT: Well, again, this isn't directly on
4 point. But at the time -- well, the Plaintiff obviously
5 knew about a certain amount of its licensing directly to
6 the Government, is that right?

7 MR. O'BEIRNE: Your Honor, the Government
8 licensed the product, not directly from Plaintiffs, but
9 for Immix.

10 THE COURT: Was the Plaintiff knowledgeable
11 about that license then?

12 MR. O'BEIRNE: About the existence of the
13 license, yes, Your Honor.

14 THE COURT: All right. And so did the
15 Plaintiff have an understanding as to what the Government
16 planned to do with those copies that it did pay for?

17 MR. O'BEIRNE: We -- the Plaintiff was
18 certainly aware of some aspect of the purpose for which
19 they would use the software in the project and we can get
20 into this -- a lot of detailed facts about this, Your
21 Honor. But, typically, software has a phone home feature
22 that will speak back to the software owner when it's been
23 downloaded.

24 THE COURT: Mm-hmm.

25 MR. O'BEIRNE: That was turned off at the

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1 Government's request. And the nature --

2 THE COURT: Turned off by whom?

3 MR. O'BEIRNE: The Government requested that we
4 turn off the phone home feature so that we would not
5 receive information over the internet when installation
6 occurred.

7 THE COURT: Well, did that not set off alarm
8 bells?

9 MR. O'BEIRNE: It's apparently a standard
10 requirement when operating in certain -- in government
11 environments where there's secure personal, medical or
12 other kinds of information. But all that is to say we
13 were not -- we were operating with limited information as
14 to how the software was practically being used to say
15 nothing of the ways in which you can clone virtual
16 environments where you make carbon copies of a virtual
17 machine running the software that is exactly the same, it
18 doesn't require an additional license key.

19 So as we're now learning, there was a
20 tremendous amount of use of the software that wouldn't
21 have been visible to us at the time and communications
22 between SMS and the Government about cloning software
23 that we were not privy to and were not discussed with
24 4DD.

25 THE COURT: Was the software developed

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1 specifically with this application in mind?

2 MR. O'BEIRNE: When you say "this application,"
3 Your Honor --

4 THE COURT: By the Government for Defense
5 Health whatever.

6 MR. O'BEIRNE: So I don't want to get out of my
7 depth just right in the moment, Your Honor, but so the
8 TETRA software is very versatile and can accomplish any
9 number of -- kinds of projects. So the data federation
10 that was going on on this government project, there were
11 aspects of the TETRA services that are offered, snap
12 caches to store information so you don't have to run the
13 same searches again, the federated system that can allow
14 different databases to talk to each other.

15 All of those kinds of software can function for
16 other purposes, other kinds of projects, they would be
17 tweaked and designed and worked with by the Government
18 and these contractors to make them optimized for this
19 DMIX medical record sharing.

20 THE COURT: Are you saying that in order for
21 TETRA to be used by the Government, the Government had to
22 do its own tweaking of the software?

23 MR. O'BEIRNE: Well, Your Honor, they had --
24 not necessarily the underlying code of the software. The
25 software can do -- there's TETRA studio where you can set

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1 up and alter what you're asking the software to do, go
2 talk to the system, and then after you talk to the
3 system, route the information in this way and those are
4 different kinds of licenses. They bought licenses for
5 the TETRA Services, the actual, you know, engine of the
6 software and then also Studio licenses so they could look
7 and see what the system they were setting up with the
8 software were doing and then alter it based on the
9 information that was coming through or whatever the needs
10 were of the (inaudible).

11 THE COURT: Well, I'm ignorant about most
12 complicated software, but typically I would think that
13 software of that complexity would require fairly constant
14 service by the licensor.

15 MR. O'BEIRNE: Service was also contemplated,
16 Your Honor, by the contracts on a periodic basis. One of
17 the benefits of the -- one of the great benefits of TETRA
18 is it doesn't have a lot of technical depth. If you set
19 it up in a certain way, it doesn't end up -- and then you
20 want to take it over to another project, sometimes you'll
21 have software that then is overly complex or, you know, a
22 chandelier of functions and it collapses on itself
23 because it's now being asked to do something that it
24 wasn't being asked to do before. It's very nimble. And
25 so there was a service component to it, absolutely.

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1 But at the same time, it's demonstrated by the
2 project documents. The Government's contractors were
3 able to use it and get great success in meeting the
4 benchmarks. The Government was having certainly tests,
5 how many transactions can we do per hour, you know, can
6 we talk to these different systems. And they were
7 working with the software in achieving these objectives
8 throughout and, you know, we were not -- we see now in
9 the Government's production, the deliverables that were
10 coming in from SMS. We tested it this way, we arranged
11 it that way. We were not on those communications. We
12 don't have the insight in real time as to how they're
13 working with it.

14 THE COURT: The entity that licensed it for you
15 or through which the Government licensed it, did it have
16 any ongoing responsibilities besides sales?

17 MR. O'BEIRNE: Your Honor, when you say ongoing
18 responsibilities, I don't want to speak out of turn. I
19 would want to go and obviously review that information in
20 more detail regarding the exact provisions of our
21 agreement with Immix and Immix's agreement with the
22 Government. So...

23 THE COURT: Well, have you taken discovery of
24 Immix or is Immix somehow -- are you co-owned by some
25 other entity?

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1 MR. O'BEIRNE: No, not co-owned, Your Honor.
2 Immix is essentially someplace where the Government can
3 go, you know, buy software from a variety of different
4 companies. And so I believe there's some documents from
5 Immix. I may be mistaken, but they're not -- they were
6 not prominently involved. They wouldn't have it -- the
7 most relevant information about what was going on on the
8 project.

9 THE COURT: They simply sell it; they don't
10 maintain it?

11 MR. O'BEIRNE: That's my understanding, Your
12 Honor. Again, I would want to check and I'd be happy to
13 get back to the Court.

14 THE COURT: All right. Well, last time we got
15 together I think was what, August, and every time we get
16 together, I ask the same question, do you know any more
17 than you did in terms of uses beyond what the
18 Government's willing to concede?

19 MR. O'BEIRNE: Oh, Your Honor, we continue to
20 see evidence suggesting many more uses beyond what the
21 Government has conceded.

22 THE COURT: And --

23 MR. O'BEIRNE: We haven't even seen the core
24 SMS documents yet.

25 THE COURT: And that -- at the risk of

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1 reopening all that, that's because -- you have not seen
2 the core SMS documents because?

3 MR. O'BEIRNE: Right, Your Honor. So as you'll
4 recall, the SMS lab was where a substantial amount of the
5 testing, at the Government's direction and with the
6 Government's oversight and with reports to the
7 Government, was going on, it was eventually a move of
8 some environments over to the Government DTC testing
9 center. We understand potentially it moved back and
10 forth several times, et cetera. What we received from
11 SMS with almost no real metadata were a spattering of
12 communications, et cetera, but not the core documentation
13 of what they were doing in their labs at the Government's
14 direction. For example, Your Honor --

15 THE COURT: I'm looking for the because.

16 MR. O'BEIRNE: Well, because they've refused to
17 produce it in third party discovery and the Government
18 had not gone and gotten it. I'll give you an example of
19 the kinds of information that we think are squarely
20 within --

21 THE COURT: That's okay.

22 MR. O'BEIRNE: Okay.

23 THE COURT: Hopefully, that problem will be
24 addressed shortly. What about on the second issue,
25 whether or not the Government was knowledgeable about any

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1 of those additional uses or authorized them.

2 MR. O'BEIRNE: Your Honor, we continue to see
3 extensive evidence that the Government was directing and
4 was being informed of the testing that was going to
5 occur, given input, was directing and was given
6 deliverables, had oversight, insights into what was going
7 on in the SMS lab. In part, the use remained in the SMS
8 lab because the Government testing center wasn't ready
9 yet and so the Government said, okay, just keep doing it
10 in your lab and then when the DTC is set up, then we can
11 move it there. So we think the evidence is overwhelming
12 that everything that occurred in the SMS lab was
13 absolutely at the direction of the Government, with its
14 authorization and consent.

15 THE COURT: Well, are you -- to what extent
16 would it be useful or are you able to comprehensively or
17 at least meaningfully respond to the motion to dismiss
18 therefor?

19 MR. O'BEIRNE: We're certainly attempting to do
20 that as fast as we can, Your Honor. Obviously, there's
21 been no deposition of the government witnesses and we
22 would want to explore that testimony with the documents
23 that we've obtained to date. So, you know, Mr. Calvin's
24 deposition has been scheduled and he obviously had a
25 leadership --

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1 THE COURT: Who is he now?

2 MR. O'BEIRNE: He was the contracting officer
3 representative and the project manager for the DMIX
4 project and was working hand in glove with SMS while they
5 were working on the project in late 2013, all the way
6 through 2014. He has provided those series of
7 declarations that -- the updated series of declarations
8 indicating how many copies were potentially used or used
9 but not configured or deleted, et cetera. So we
10 absolutely have a lot of questions for Mr. Calvin based
11 on the documents we've seen and we think that --

12 THE COURT: Is he the person that would be the
13 30(b)(6) on documents?

14 MR. TODOR: On documents -- I don't know about
15 documents. Probably not. He would be the person on
16 installations.

17 THE COURT: I thought you all had somebody
18 designated -- I thought you all had somebody designated
19 to be the documents 30(b)(6).

20 MR. TODOR: We haven't designated anyone yet.
21 There hasn't been a notice yet. Plaintiffs have stated
22 in their, you know -- in their joint status report they
23 intend to file a 30(b)(6) on document retention and
24 document production. They haven't filed it yet. We
25 haven't identified a witness yet.

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1 MR. MEYERS: And, Your Honor, if I may speak to
2 that -- that point. As we indicated in the joint status
3 report, there are a number of issues that have come to
4 light about the Government's failure to preserve
5 documents and we would send a 30(b)(6) -- I think the
6 parties' both reading of the Court's last order was that
7 depositions were not to occur --

8 THE COURT: Mm-hmm.

9 MR. MEYERS: -- until the Government produced
10 its documents, and that's a sensible ordering now sort of
11 thrown into disarray because the Government says we're
12 not going to be able to produce by the date that the
13 Court ordered. But we'd like to take a deposition on the
14 30 -- the 30(b)(6) deposition on document preservation
15 and document destruction. We'd like to do that in ten
16 days, because there are a number of serious issues, the
17 deletion of Denise Stokely's (phonetic) laptop.

18 There are a number of contractors -- SMS
19 returned 34 laptops to the Government that all had --
20 government-furnished equipment that were not preserved.
21 In other words, that were reimaged by the Government and
22 at a point in time where -- it looks like we had filed a
23 lawsuit so there definitely were preservation obligations
24 and there certainly were preservation obligations when
25 the Government deleted and reimaged Denise Stokely's

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1 laptop.

2 We have an email that we reference. It's in
3 Exhibit F to our motion to compel and it's relevant to
4 that issue, but it also underscores the number of
5 entities that had copies of TETRA. She wrote -- she
6 wrote, you know, we can substantiate the existence of
7 TETRA software in our prior lab and she says she had a
8 TST file containing all emails referencing the virtual
9 machines that had TETRA on it. So that was on a computer
10 that she handed over to the Government in response to a
11 government preservation order and the Government did the
12 opposite of preserving it. The Government reimaged --

13 THE COURT: Remind me, is she a third party?

14 MR. MEYERS: She is. She's a third party
15 contractor with KSJ. And --

16 THE COURT: Is this the one where it was
17 reimaged four days after the preservation request went
18 out?

19 MR. O'BEIRNE: She had two laptops. We've
20 gotten a limited understanding from KSJ. Apparently, she
21 had two laptops. One was turned back and she was given
22 another government-furnished laptop during the -- during
23 the open period of when she was working, you know, on the
24 government contractors. She turned her old one in and
25 got a new one with the information. The second one that

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1 was turned back to the Government was apparently turned
2 back to the Government in late 2016, was only wiped two
3 months ago.

4 MR. MEYERS: Yes, August 28th.

5 MR. O'BEIRNE: 2017.

6 MR. MEYERS: 2017. So it was four days after
7 we had received an email from KSJ's counsel who's been
8 before the Court, Ms. Heischmidt, and we asked her about
9 this and she said, yes, Ms. Stokely returned that
10 computer to the Government. And four days after that,
11 the Government wiped that computer clean and didn't
12 preserve it.

13 MR. TODOR: Your Honor, that's -- okay,
14 Complainants are taking that sequence from I believe an
15 email we sent them updating them on what happened.
16 That's not our understanding of what happened. Our
17 understanding is Ms. Stokely received the upgrade on the
18 laptop in -- on or about February of 2016 just to get a
19 faster laptop (inaudible) the work. She turned it in in
20 November of 2016 because she had left KSJ, not in
21 response to the preservation order as Plaintiffs are
22 saying. Our understanding is she did not flag for the
23 laptop management people, different people than the ones
24 who had sent her the notice to preserve document that,
25 you know, there may be responsive documents on it.

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1 In terms of the contents of documents related
2 to her, Plaintiffs got the email that they're referring
3 to from, I believe, an ICS-Nett production. The ICS-Nett
4 contractors, as well as KSJ, as well as government people
5 were working together on the project. It is very likely
6 that some or maybe a great deal of Ms. Stokely's emails
7 would have been either on the Government's email system
8 or on emails to or from other contractors or to and from
9 government employees. For example, the email they sent
10 was to Joshua Zamarripa --

11 THE COURT: Hang on, hang on. Are you saying
12 that, therefore, even if it was wiped out, most of this
13 stuff is probably preserved elsewhere?

14 MR. TODOR: There would have been other places
15 it could have been preserved, yes. I don't have a
16 representation here as to how much there was and how much
17 was preserved, but we're saying that there's a good
18 chance that, you know, a portion of it is in other
19 places.

20 THE COURT: Well, all right. Are you telling
21 me that there's no reason to think that the word didn't
22 get out to preserve things both internally in the
23 Government and to the contractors?

24 MR. TODOR: Yes, there's the litigation hold
25 that was sent both to government employees and to

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1 contractors notifying them of the lawsuit and of the
2 preservation obligation. There was also a requirement
3 for government people to -- and I believe some
4 contractors -- to report back as to whether they had
5 responsive materials in response to that.

6 Our understanding is when Ms. Stokely turned in
7 the laptop, not as part of the preservation order, but as
8 part of -- because she was leaving, she did not
9 specifically flag, you know, hey, there could be
10 responsive documents on this laptop and she turned the
11 laptop in to the people who processed it. However, we
12 believe that since she is emailing back and forth with
13 other contractors who produced responsive materials,
14 including the email we're talking about and with
15 government employees, that we could search the
16 Government's email system for documents either to or from
17 Ms. Stokely or, you know, any records in Ms. Stokely's
18 account where we could certainly in PST, as an Outlook
19 email file, where we could produce whatever we have in
20 terms of emails involving Ms. Stokely.

21 THE COURT: Is there any reason not to go ahead
22 and do an initial 30(b)(6) deposition on the
23 understanding that if it turns out -- if the facts
24 warrant having another one later, we could do that?

25 MR. TODOR: Well, the -- first, the question is

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1 whether the Court, you know, wanted the depositions to
2 occur -- if the Court wishes for the deposition to occur
3 before all the document production is completed, then,
4 you know, we'll move forward on that basis. In terms of
5 preparation for the deposition, Plaintiffs were talking
6 about a ten-day turnaround. We are, you know, very
7 actively engaged in trying to turn around Plaintiff's
8 most recent round of email requests. This would be going
9 on during that time and would be -- would impair both the
10 preparation of the witness and, you know, our ability to
11 produce the emails the Plaintiffs are talking about.

12 THE COURT: Well, who do you have in mind to be
13 responsive on a deposition like that? Is there a single
14 person?

15 MR. TODOR: Well, that's the other problem. So
16 we have two physical locations where people were involved
17 with this. There was the location -- I believe people
18 were in Rosslyn, in Arlington, who were involved in
19 production on the DHA system. After the DTC system was
20 ran down, what became that system or that center -- those
21 functions were moved to San Antonio. So there was --
22 there would be separate people in San Antonio who were
23 involved in the production of those documents.

24 THE COURT: When did that happen?

25 MR. TODOR: That was with -- I believe with the

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1 decommissioning of the DTC Richmond facility, which
2 occurred in September or October of 2015. Those
3 functions were transferred to San Antonio.

4 THE COURT: Why was stuff transferred in bulk
5 over to West Virginia?

6 MR. TODOR: That's a different process. So DHA
7 processes were transferred to San Antonio, the health
8 care. The West Virginia facility they're talking about
9 is the Allegany Ballistics Lab. So there were hard
10 drives created from the DTC servers that had software one
11 would use to operate a server system, not necessarily
12 connected to health care. Those hard drives were used to
13 transfer those -- that software to the West Virginia
14 facility.

15 So if the Plaintiffs are asking for, you know,
16 document retention, there was no work done on, say,
17 developing TETRA that we're aware that could have been
18 going on in the West Virginia facility or in the San
19 Antonio facility since they -- you know, part of the
20 reason it was transferred to San Antonio was they had
21 decided not to move forward with the integrated
22 electronic health record system that, you know, they were
23 using the TETRA software, so there was no use for it
24 after that. That's why there was the true-up and, you
25 know, people went on.

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1 But there were responsive documents produced,
2 you know, Plaintiffs had from individuals who were not
3 working in San Antonio such as Ms. Stokely or Mr.
4 Zamarripa, the chief engineer down there --

5 THE COURT: I'm sorry, down -- he was where?

6 MR. TODOR: In San Antonio. But he wasn't
7 working on the Richmond project that at least I know of
8 at this point. But those functions were transferred to
9 San Antonio.

10 THE COURT: Well, I've seen a number of emails
11 involving Mr. Zamarripa. Why would he be involved in it
12 if the TETRA-related activities ended when DTC
13 transferred that function?

14 MR. TODOR: Because Plaintiff's document
15 requests span from January 1st, 2012 to the present and
16 the individual they're talking about, Ms. Stokely, a KSJ
17 employee, Mr. Zaparippo, you know, right before, he was
18 the one telling her, yes, you have this preservation
19 obligation because when Plaintiffs filed the lawsuit, the
20 functions have been to San Antonio.

21 THE COURT: So his function is purely
22 contemporaneous and not at the time TETRA was in use?

23 MR. TODOR: That's our understanding at this
24 time. We haven't interviewed him on whether he was
25 involved in any technical development. But in terms of

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1 the document retention piece of the puzzle, he was the
2 one that -- as far as we know, telling people, hey, this
3 lawsuit has been filed, now it's 2016, so not when the
4 work was being done. But this lawsuit's been filed, we
5 have this preservation obligation. He was the one
6 telling people to do that.

7 THE COURT: So who is in a position to decide
8 when computers get reimaged or files get shredded and
9 that kind of thing? Is there one single relevant point?

10 MR. TODOR: Which computers is the Court asking
11 about?

12 THE COURT: Well, all right, I'm on the status
13 report, page 1. The Government's preservation and
14 production of files from the government-furnished
15 computers, I assume these are computers furnished to
16 third parties during something --

17 MR. TODOR: Okay.

18 THE COURT: -- that's relevant to this lawsuit.

19 MR. TODOR: These are laptops that were issued
20 to -- issued or the Government gave the contractor money
21 to buy laptops for employees to use on the project.

22 THE COURT: Okay. Those laptops.

23 MR. TODOR: What the Plaintiffs called
24 government-furnished equipment. Those laptops, we
25 investigated -- so we talked to the people in Rosslyn, we

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1 talked to the people in San Antonio. Is there a written
2 policy for whether you keep an archive for that? No. We
3 asked them whether they have any records of who the
4 laptops were issued to, when did they get them, what did
5 they do with them. They've gathered that. They told me
6 that they did not have a policy, and the records indicate
7 that they did not, keep an archived copy of the laptops
8 when they came in.

9 They did have a record of having issued the
10 litigation hold to the employees or to the companies that
11 had employees using the laptops, they did not keep --
12 take a copy when they were turned in. They were turned
13 in to a different center of the people who manage the
14 laptops not the PNs on the project or what have you. So
15 there was different people involved.

16 Our understanding is that they did not keep a
17 copy of the laptops when they were turned in, but if the
18 laptops were used, as is often the case, on the
19 government systems, then records of what was being done
20 with the laptops, such as emails, documents being sent
21 very well may be on the government system either as
22 records in their own, an account of that person, or
23 emails to or from other people or to the government
24 employees involved.

25 THE COURT: So laptops were used by

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1 contractors, turned back in to DHA.

2 MR. TODOR: Yes.

3 THE COURT: And there was a preservation order
4 in place when those laptops were purged?

5 MR. TODOR: Yes.

6 THE COURT: Why did they get purged?

7 MR. TODOR: Our understanding is the IT
8 personnel handling it didn't interpret it as those being
9 government documents to be kept. They just reimaged them
10 or, you know, kept them, and then in cases they were
11 issued to other employees. We asked the people -- the
12 more senior people involved why this occurred. They
13 didn't have an answer beyond they didn't view them as
14 government documents; they viewed them as things that the
15 third parties were using.

16 THE COURT: So is that likely to continue to
17 happen in the future?

18 MR. TODOR: We hope not. I instructed them not
19 to do that. I instructed them, you know, going forward,
20 if something comes in -- if anything else comes in and I
21 instructed them to find out if there were any that still
22 had responsive material on them.

23 MR. MEYERS: Your Honor, may I comment on that?
24 So we went back -- we were reviewing correspondence that
25 Mr. Todor had with prior counsel for Plaintiffs, and in

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1 May of this year, before we came in, he had an exchange
2 with prior counsel -- the Government had an exchange with
3 prior counsel about SMS laptops because, apparently, it
4 emerged that SMS had returned 34 laptops, and 19 of
5 those, at least, were returned after the Government --
6 after we had filed -- our clients had filed the suit. So
7 certainly, preservation obligations were required at that
8 point.

9 The Government reimaged all 34 of those laptops
10 and didn't preserve any of that data. And Mr. Todor
11 assured prior counsel that he had instructed his client
12 to change the process. And I'm sure he did. I'm not
13 doubting that he gave that instruction. But then we
14 learn that the Government wasn't following that
15 instruction because Ms. Stokely's computer was reimaged,
16 even though the Government had told her there's an
17 evidence preservation obligation that applies to your
18 data. And the Government reimaged that this past August.

19 So we're really concerned -- and this is why we
20 think we needed the 30(b)(6) and we need it very soon,
21 because if Mr. Todor at the Justice Department is
22 advising the Defense Health Agency personnel to preserve
23 data, the message is not getting through and we need to
24 find out what's going on. And depending on what we find
25 out, we need to come back to this Court so that, you

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1 know, appropriate measures can be taken and whatever
2 consequences of what has been lost and what can be
3 recovered can be hammered out. We just can't sit back
4 and rely on these sort of assurances anymore from the
5 Government.

6 THE COURT: Okay. When I suggested a sort of
7 interim 30(b)(6), you're saying that conflicts with this
8 massive email review. Well, two things, one, it sounds
9 as if we need to do an interim 30(b)(6) for one or more
10 people with respect to current document production and
11 retention issues, number one.

12 But, number two, your concern about the volume
13 of emails, I'm willing to entertain that problem, but my
14 suggestion would be that we don't need to resolve that
15 before we have an interim 30(b)(6). I'm more concerned
16 given the possibility of spoliation in the recent past
17 and the frustrating nature of trying to figure out sort
18 of basic information here that it's best to go ahead and
19 move forward irrespective of the email problem and
20 without prejudice to the Plaintiff's ability to take a
21 different deposition down the road, if necessary.

22 But on the emails, I believe you indicated that
23 if we had narrower search terms for that pile of stuff,
24 we might be able to isolate more responsive emails. Is
25 that right?

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1 MR. TODOR: Yes. And the two terms that we
2 noted in their search terms "core" and "port," you know,
3 could be -- appear in a lot of range of documents that
4 wouldn't necessarily be focused on this case.

5 THE COURT: So where does that stand?

6 MR. MEYERS: Your Honor, we told Mr. Todor
7 that we were open to discussing that, but we need more
8 information. We haven't gotten the -- like sort of an
9 analysis of like here are your terms and here are the
10 number of hits so we could see what the problem children
11 are there. Without that, it's hard for us to --

12 THE COURT: Hang on. Does that exist?

13 MR. TODOR: Not yet. I've instructed the IT
14 contractors retained for the case to do that. They
15 haven't done it yet. They're expected to have it by the
16 end of the week.

17 THE COURT: Are they able to say the reason you
18 got 700,000 is because they had the word "X" in it?

19 MR. TODOR: Our email review software, you can
20 search for a term and you can get the number of hits you
21 get in response to a term.

22 THE COURT: Okay. Well, I don't know how long
23 that will take or how long it would take to rerun the
24 production. So a database exists with roughly 800,000
25 emails that can be now manipulated to a smaller number?

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1 MR. TODOR: Our understanding is there were
2 about 850,000 pages and about half of what was to be
3 loaded. So it would be about 1.7 million pages total.
4 Our understanding was somewhere in the neighborhood of
5 300,000 documents.

6 THE COURT: What do you want to move forward
7 with skinning down the request first or do your 30(b)(6)
8 on document production? I don't care, but I think -- I
9 think I would expect you all to negotiate that decision
10 sooner rather than later. I guess what -- in effect,
11 what I'm ordering is that I will allow the Plaintiff to
12 do a 30(b)(6) on this, and potentially other issues, on
13 an ongoing basis, if necessary, to figure out what's
14 going on with the documents.

15 But it might make sense if Mr. Todor can
16 generate a means for narrowing that search and if that
17 search can be done in short order before you depose
18 somebody, it might make sense. But I won't require it.

19 MR. MEYERS: Thank you, Your Honor. I think we
20 envisioned this in parallel because I think that our view
21 of the need for the 30(b)(6) was more on the
22 preservation, retention and destruction of documents as
23 much as -- not as much as the --

24 THE COURT: Well, let me interrupt. I'm sure
25 the Plaintiff has a legitimate reason for pursuing that

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1 in discovery, but I view that as an attorney issue from
2 your side. I'm taking you at face value that the
3 instruction is out there.

4 MR. TODOR: We repeated it. And to clarify
5 with respect to the discussion of May, we sent the --

6 THE COURT: Mm-hmm.

7 MR. TODOR: -- the instruction in May, we were
8 in contact with the people in Rosslyn who were managing
9 the SMS laptops and those are the people I had this
10 specific conversation with. There were people in San
11 Antonio who, now that this issue has come to light, I've
12 learned about that, you know -- you know, when I wrote to
13 Plaintiffs about the issue. So I had not been alerted to
14 or have not had the same conversation with the people in
15 San Antonio that I had had with the people in Rosslyn
16 when I notified them of the issue. But, now, I've
17 repeated the instruction to the people in San Antonio and
18 have asked them to track down whatever there is.

19 THE COURT: Well, all right. It's hard for me
20 to assess the likely results you're going to get. But
21 I'm assuming that somebody with some imagination has been
22 told on the part of the agency, this cannot happen. And
23 if it does, then the agency is going to suffer the
24 consequences in terms of spoliation penalties in terms of
25 evidentiary proofs or whatever down the road.

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1 So whatever it takes to get that message out
2 there. I'm not saying that it's not -- the Plaintiff
3 can't pursue what the cock-up was the first time around,
4 but I'm more concerned that it doesn't repeat itself.
5 And so you've told me that that message is out there;
6 I'll just take that at face value.

7 Do you know yet what you want to do?

8 MR. MEYERS: Your Honor, I'll confer with my
9 clients, but I suspect we'll want to proceed now with the
10 30(b)(6) on document preservation and destruction.

11 THE COURT: Okay.

12 MR. MEYERS: And we will, in parallel, work
13 with the Justice Department to try and narrow these
14 terms. I do want to emphasize, Your Honor, we asked for
15 these custodians in July and then Your Honor ordered the
16 Government, on September 11th, to produce -- finish the
17 production by October 13th. We haven't gotten a single
18 document from any of these additional five custodians
19 yet, and we only learned from the Government for the
20 first time this past Thursday that they haven't started
21 reviewing the documents, we've got too many. So we'd at
22 least like a rolling production.

23 I mean, I think search terms are a useful
24 approach, but they are other means of identifying
25 responsive documents and just getting them out the door,

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1 and the Government hasn't done any of that yet. So we're
2 happy to work with them to try and narrow the terms, but
3 we do think that in parallel, it can't be an either/or
4 thing. The Government needs to be able to start rolling
5 productions of responsive documents.

6 THE COURT: Well, unless I'm missing something,
7 I don't think I'm going to require that. You're telling
8 me you're confronted with 850,000 pages, probably twice
9 that from the current search.

10 MR. TODOR: Yes.

11 THE COURT: Is -- I think counsel's suggestion
12 is if there's another way to approach that heap of paper
13 that will allow you to start producing some of it now.

14 MR. TODOR: I'll -- well, as I communicated to
15 Plaintiff's counsel when we conferred last Thursday -- or
16 Friday, the documents are basically in three tranches.
17 And we have -- and they're by the email system that was
18 being searched. The email system for Department of
19 Defense, the main one that was a new system instituted
20 from 2015 onward, had -- there were about 11,000 emails
21 from that search. That will be the easiest to search,
22 but also not the ones from the active phase of this
23 project.

24 The second tranche of roughly 850,000 pages,
25 that is from the Department of -- the Defense Health

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1 Agency legacy system, probably the most pertinent to the
2 case. My suggestion would be that we refine the search
3 terms for that database, and then on a rolling basis, we
4 could get those out the door sooner than if we had the
5 second half of this, which is basically from one
6 custodian, Chris Miller, who is a senior executive
7 service official. He was on the Defense Health Agency as
8 a director -- as the -- as a detail. But his main
9 function is at the Space Weapons Research Institute in
10 South Carolina. He had another email there. There were
11 146 gigabytes in that production, but those are much less
12 likely, it would appear, to be pertinent to this case
13 because those are, by definition, not the ones when he
14 was working at DHA.

15 So in terms of streamlining the process, we'd
16 propose that we review the ones -- the 11,000 set first,
17 then the narrowing down of the terms for the DHA legacy
18 set. Ideally, we can get something where we can move
19 that out more quickly and do the ones from the South
20 Carolina Space Center one last.

21 THE COURT: All right. I'm back where I was.
22 I haven't heard anything that makes me think that there's
23 anything to be gained by not going through that drill.
24 But what I'm not doing is simply deferring until December
25 the obligation to produce whatever is responsive. I'm

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1 not saying it has to be done by -- what is it -- October
2 13th?

3 MR. MEYERS: That's in the current order, yes.

4 MR. TODOR: That was the Court's order, yes.

5 THE COURT: I guess I'd rather reconvene by
6 telephone in a couple of weeks to find out what's going
7 on. I guess what I'm assuming is that in the next couple
8 of weeks that that first, most useful tranche of material
9 you alluded to for the right time period would be
10 searched based on a narrower set of search terms. And
11 what I'm looking for is a quick production of that
12 material.

13 And then, depending on what kind of results you
14 get and how long that takes, realistically, you can
15 propose what to do with those other two tranches of
16 material to search. But that's not a license to simply
17 run this out until December. So I'd like to reconvene in
18 a couple weeks after you all -- after Plaintiffs present
19 that narrower set of terms, the Government runs it in
20 that first group of material, and let's see what kind of
21 results you get.

22 The second item was email custodians. Now,
23 what's that about? You have five custodians, right?

24 MR. MEYERS: So we have asked for five
25 additional custodians and those are the emails that we

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1 have been discussing.

2 THE COURT: Which are the first --

3 MR. MEYERS: The first ones are the documents
4 that the Government has produced today. So for the --
5 the Government has produced emails from the five
6 custodians and then there's --

7 THE COURT: This group that we've been talking
8 about, these three different tranches, 1.6 million pages,
9 whatever, we're talking about that second group now?

10 MR. MEYERS: Yeah, the second find, yes.

11 THE COURT: So the first -- the batch
12 responsive to the first five custodians has been
13 produced?

14 MR. MEYERS: It has been produced and that's
15 what -- we're in the process of reviewing that. I think
16 from a review of those documents, as well as the
17 smattering of third party documents -- and we've told Mr.
18 Todor this -- we've identified some additional custodians
19 on top of the second set -- second five that we think
20 need to be produced, and we're formulating that list and
21 we'll share that with the Government and confer with them
22 on the timetable for the production of those documents.

23 THE COURT: Hmm, okay. Is that likely to be
24 amended, reduced, expanded after the 30(b)(6)?

25 MR. MEYERS: Well, I don't know, Your Honor.

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1 Honestly, I don't know. I would like to be able to tell
2 the Court --

3 THE COURT: Okay. Well, as I said, let's
4 reconvene in two weeks.

5 Access to the encrypted hard drives. Are these
6 hard drives different than the ones we were talking about
7 earlier?

8 MR. MEYERS: No, it's the same ones, Your
9 Honor, and it's the ones that you had ordered the
10 Government to either direct an employee of the Government
11 or request a contractor to assist us with accessing. And
12 the Government did not direct a government employee to
13 assist us with accessing. As I understand it from Mr.
14 Todor, the Government asked a company called MicroHealth
15 and MicroHealth has said it would need some sort of
16 contract modification. So we haven't been able to access
17 these hard drives.

18 THE COURT: Well, tell me what universe of hard
19 drives we're talking about if they're not the ones --

20 MR. MEYERS: Sure.

21 THE COURT: -- that were turned back in by all
22 these contractors.

23 MR. MEYERS: So these are -- these are not
24 laptops. These are -- Mr. Todor alluded to it, which is
25 also an issue with the preservation and spoliation

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1 issues. The Government decommissioned the Richmond
2 Development Testing Center, the DTC, in -- I think Mr.
3 Todor said here today September or October, which is what
4 we had thought, after we had filed suit. So the first
5 question of evidence preservation.

6 What we understand is that the contents of the
7 DTC was put on these hard drives that were meant to serve
8 as the way to transfer those contents to the Allegany
9 Ballistics Lab.

10 THE COURT: Strictly for archiving?

11 MR. MEYERS: I don't think it's strictly for
12 archiving. I think it was a means of trans -- of moving
13 data from the DTC, which was being decommissioned, to the
14 Allegany Ballistics Lab.

15 THE COURT: So do you know what happened to the
16 original material?

17 MR. MEYERS: I don't. I mean, that was
18 something we want to ask the 30(b)(6) on document
19 preservation.

20 THE COURT: Was that strictly copying or was it
21 copying and deletion?

22 MR. TODOR: The person we spoke to said that
23 the hard drives were not meant to be a permanent record,
24 they were meant to transfer, because these are six
25 terabyte hard drives, huge volumes of data. These are

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1 very large, you know, applications that are meant to
2 transfer to the server, you know, in the ABL. Some
3 portions of them may have been copied over or used for
4 other things. He wasn't sure what. We're looking for
5 records on -- if there is anything on that.

6 THE COURT: Well, hang on. Are you talking
7 about the originals might have been copied over in part
8 or the copies that were sent to West Virginia?

9 MR. TODOR: The hard drives were -- had things
10 from Richmond put on them. That was taken to West
11 Virginia. Those things were put on West Virginia. There
12 may have been other things that needed to be put on those
13 hard drives to continue to take it to West Virginia.
14 Portions of it may have been erased, other stuff put on,
15 and then that taken over to West Virginia and put on in
16 West Virginia.

17 THE COURT: I'm still not sure what happened to
18 the original data. Was it merely copied or was it
19 transferred?

20 MR. TODOR: So it was copied from the servers
21 in Richmond.

22 THE COURT: So the original --

23 MR. TODOR: So there were some images of the
24 Richmond servers were some of the files on these hard
25 drives, which is why we viewed them as responsive

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1 documents and produced them.

2 THE COURT: What --

3 MR. TODOR: But --

4 THE COURT: If the original material is still
5 there in whatever is left of DTC in Richmond, why do we
6 need these other hard drives?

7 MR. TODOR: Okay. The Richmond facility was
8 decommissioned because they decided to close the
9 facility.

10 THE COURT: Mm-hmm.

11 MR. TODOR: So ABL said, well, we need some of
12 this software, they transferred it there. Functions of
13 DHA were in San Antonio (inaudible) because they ended
14 the project to develop the software that the (inaudible)
15 are using here. Those physical servers, I was informed,
16 were wiped, were transported to San Antonio. Some of
17 them were actually damaged in transit to San Antonio.
18 But the -- they wouldn't have had any data at the time
19 they were being transported.

20 Also, I've been informed by everyone I've
21 talked to that the --

22 THE COURT: They wouldn't have any data. That
23 means it wasn't copied, it was transferred to these hard
24 drives.

25 MR. TODOR: It was copied to the hard drives,

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1 transferred.

2 THE COURT: Yes.

3 MR. TODOR: Later, the original servers wiped,
4 transported to San Antonio.

5 THE COURT: I see.

6 MR. TODOR: Everything we've been informed is
7 that the original servers -- there have been several
8 change orders -- Plaintiffs have brought these up before
9 -- to delete all instances of TETRA from these servers in
10 the fall of 2014. The last one, I believe, was issued in
11 January 2015. The decision to decommission the Richmond
12 facility, I believe, occurred in May or June of 2015 and
13 that process was completed, I think, in September or
14 October of 2015.

15 I understand from everyone we've talked to
16 that the TETRA software would not have been on those
17 servers at the time those hard drives were created to
18 transfer things to West Virginia. Nevertheless, because
19 they had images of the Richmond servers and may be the
20 only ones, you know, that are available, we viewed them
21 as responsive documents and produced them to Plaintiffs.

22 THE COURT: And how many of these hard drives
23 are there?

24 MR. TODOR: I believe there are six. There
25 were seven, but I believe one was physically damaged so

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1 they couldn't access the data on that.

2 THE COURT: How do they organize themselves?

3 MR. TODOR: Hmm?

4 THE COURT: How are they organized?

5 MR. TODOR: One was in the file cabinet of --

6 THE COURT: No, I mean, what's on them? I
7 mean, why did it take six extremely large hard drives to
8 copy all this stuff?

9 MR. TODOR: Basically software you'd use to run
10 a server. Microsoft software was the main component from
11 the file listing that I saw. There were also some
12 applications you'd use to operate in a server
13 environment. I was told that some of those applications
14 were also transferred to --

15 THE COURT: Are there indices to --

16 MR. TODOR: -- West Virginia.

17 THE COURT: -- these hard drives?

18 MR. TODOR: There were that we produced to
19 Plaintiffs with kind of a top-level listing of what's on
20 them. But in terms of accessing them, actually to fire
21 them up and see what's on them, no government employee
22 had that information. The contractor had done it before
23 using the same passwords and instructions that we had
24 given the Plaintiffs. That was the person we requested
25 to appear per the Court's order.

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1 The response we got from that contractor, who
2 was now under a different prime contractor, was they need
3 to check with the prime contractor. The prime contractor
4 said, well, it doesn't appear within the scope. We're
5 having a contracting officer determine whether it's in
6 scope. But the larger problem there is the subcontractor
7 employee, they represent to us, doesn't have any more
8 information than what we've given the Plaintiffs in terms
9 of instructions of how to do it. Therefore --

10 THE COURT: Well what's the point of this
11 exercise if this information is now inaccessible?

12 MR. TODOR: There are images of those original
13 servers on at least some of the hard drives.

14 THE COURT: Yeah, that's my question. What was
15 the point of copying all that stuff to these separate
16 hard drives if nobody could access them?

17 MR. TODOR: Well, there was -- there was
18 encryption placed on them to protect them. There were
19 passwords and instructions for how to do it with the
20 passwords for the encryption. Our understanding was that
21 would be enough to access them and that had been done
22 before. So it's not meant to be inaccessible, it's meant
23 to be accessed with the passwords that, you know, we
24 have.

25 THE COURT: Which don't appear to work.

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1 MR. TODOR: Which -- yeah, we were told by
2 Plaintiffs didn't work. I've instructed the IT
3 contractors we've retained for this case to see if it
4 works, if we can get it to do it ourselves. We have also
5 spoken with Plaintiffs about this and Plaintiffs have
6 reached out to ICS-Nett, the contractor that actually
7 originally apparently made these hard drives and placed
8 the encryption on in the first place, to see if they can
9 straighten it out.

10 THE COURT: You've looked at the indices to all
11 these hard drives?

12 MR. MEYERS: We have. I don't think they're
13 all that informative. But there is certainly some -- I
14 think the big question is, given the volume of data, it
15 can't be that all they had was sort of the operating
16 software for a server. It has content on it. And we
17 think that that content was the actual content in the DTC
18 and we'd like to analyze that to see if there's TETRA in
19 there or if there's evidence of how much TETRA was in the
20 DTC before the Government secretly deleted that -- those
21 copies of TETRA without telling our clients.

22 THE COURT: All right. So 2014, an order goes
23 out, eliminate all copies of TETRA?

24 MR. MEYERS: Yes. Yeah, September -- I think
25 September 2014 was the first change order that was sent

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1 out. Our clients, a few days before, had said --

2 THE COURT: Well, whatever. The transfer to
3 these hard drives occurred thereafter?

4 MR. MEYERS: Right. I think we understand that
5 the transfer to these hard drives occurred sometime in
6 2015.

7 THE COURT: So what makes you think that the
8 order to eliminate all TETRA somehow missed something?

9 MR. MEYERS: Well, we don't know. I mean, I
10 think that -- A, we think that -- we're interested in
11 trying to look at the data to see does the data show how
12 much TETRA was on there. It's pretty hard to delete
13 things permanently and not be able to recover. You
14 really have to work at it. And so we'd like access to
15 the data that was imaged on these servers to be able to
16 analyze it and be able to see if we can figure out the
17 extent of TETRA that was on the DTC.

18 MR. O'BEIRNE: And we --

19 MR. MEYERS: I'm sorry, go ahead.

20 MR. O'BEIRNE: I'm sorry, if I may add one
21 other point, Your Honor. It was not one change order.
22 They were sequential. The first said delete it here, but
23 not there. And then there was follow-up change orders,
24 okay, now delete it every place, and then there was
25 confusion among the contractors. Well, should we delete

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1 it over here?

2 In the documents, the correspondence we've
3 already seen, we think it's very likely that they might
4 have intended to delete it and not fully deleted it or
5 the logs and the other kinds of information would exist
6 on there with what was done at what various times.

7 Secondly, Ms. Stokely's emails in our motion
8 are a perfect example. The preservation hold went out
9 and people at KSJ said, oh, no, we don't have any
10 information about the DTC. And she says, I'm obliged to
11 tell you I have an entire TST file with -- documenting
12 everything that happened in the DTC. So we've already
13 seen where some people with some responsibility on the
14 project would say, oh, no, wait a minute, we deleted all
15 of it. Well, it turns out, never mind, no, we didn't,
16 it's still here on the server, et cetera. So that's why
17 we want to get into the documents. We want to get into
18 the hard drives, Your Honor, to see what's on there,
19 because we think there's reason to believe it would be
20 there.

21 THE COURT: All right. In terms of -- assuming
22 there's access, Mr. Todor, do you have any problem with
23 the Plaintiff simply accessing this onsite as opposed to
24 copying it?

25 MR. TODOR: We provided Plaintiffs with

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1 forensic copies of those same hard drives. So there's no
2 site in Richmond for them to look at anymore. So --

3 THE COURT: I thought the stuff was all on West
4 Virginia.

5 MR. TODOR: So West Virginia -- the -- so West
6 Virginia, you know, I don't know what is in West Virginia
7 other than what I've been told by the people who, you
8 know --

9 THE COURT: So you're telling me that if the
10 Plaintiffs can crack these things, it's no concern to the
11 Government either in terms of expanse of time or
12 anything, Plaintiffs can evaluate to their heart's
13 content if they can get into it?

14 MR. TODOR: Yes, although we did produce it
15 with the proviso that, you know, if there are things that
16 are, you know, later determined to be subject to
17 attorneys' eyes only designation, we would reserve the
18 right to do that later.

19 THE COURT: Right. Okay, so how --

20 MR. TODOR: We would produce it under that
21 designation because their consultants are looking at it.

22 THE COURT: So the only issue is access. And
23 so what's it going to take to resolve the question of
24 whether or not the Plaintiff's code really works or not?

25 MR. TODOR: So we are proceeding on three

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1 fronts. One is we're -- we asked that's the contractors
2 we retained for the litigation at DOJ to see if the codes
3 work. Second is we've asked the --

4 THE COURT: Well, how long will that take?

5 MR. TODOR: They haven't told me.

6 THE COURT: I mean, I can't imagine -- it's you
7 sit down at a computer and type in a password, right?

8 MR. MEYERS: Our vendors told us within like 24
9 hours that they couldn't access these, so -- this has
10 been going on for weeks, Your Honor.

11 THE COURT: Mm-hmm.

12 MR. TODOR: This is the same contractors who
13 are processing the emails for us now, so I put a lot on
14 their plate and, you know, put this on their plate
15 specifically because of this issue in the JSR. They
16 haven't given me an estimate for how long it's going to
17 take them to figure that out.

18 THE COURT: Well, let's prioritize this one
19 little question of access.

20 MR. TODOR: Okay.

21 THE COURT: Above the email question.

22 MR. TODOR: Second was we are -- you know, we
23 instructed -- we've asked DHA, have the contracting
24 officer rule on whether this is within scope for this
25 subcontractor to do. Third, since the subcontractor was

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1 saying --

2 THE COURT: To try to sit down and access it?

3 MR. TODOR: To -- the Court's order from
4 September 11th contemplated that we request a contractor
5 to go to Plaintiff's IT contractor's facility and
6 basically try to assist them onsite.

7 THE COURT: Mm-hmm.

8 MR. TODOR: That's what we requested. And that
9 was what the contractor was saying, well, we don't think
10 that's in the scope. We've asked the government
11 contracting officer to determine whether that's in the
12 scope. If not, we'll, you know, work from there.

13 Third is Plaintiffs have reached out to ICS-
14 Nett, the company that made these -- made the encryption
15 on these initially to see if they can assist both parties
16 in accessing -- you know, we have an interest, we want to
17 know if Plaintiffs go into these things and say, oh, we
18 found, you know, a bunch of copies of this software, you
19 owe us money, obviously, we need to be able to confirm
20 that ourselves. So we want to make sure we're having the
21 same ability to access them that the Plaintiffs have.

22 THE COURT: Which, to me, suggests that whoever
23 it is that you're dealing with shouldn't be charging any
24 additional amount unless, perhaps, it's a trip to
25 wherever Plaintiff's facility is. But it looks to me

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1 like this would be a fairly simple thing to decide
2 whether or not the code works -- the access code works.
3 So I'm assuming that will be prioritized.

4 And if the Plaintiff gets access through ICS in
5 the meantime, I assume you will tell the Government.

6 MR. MEYERS: Yes, we've copied Mr. Todor on our
7 email correspondence with ICS-Nett's attorneys.

8 THE COURT: Search for Plaintiff's software at
9 Allegany Ballistics Lab. Are these the same hard drives
10 we're talking about?

11 MR. MEYERS: Well, I think it's the -- the data
12 that was transferred off of the hard drives and then put
13 into ABL and then I think -- we don't know what was done
14 in the Allegany Ballistics Lab with what was on those
15 hard drives. We've seen references in a number of
16 project documents that contemplated work being done in
17 the ABL. And so, you know, as we were saying, we can't
18 sort of trust that there was no -- there were no more
19 copies of TETRA given --

20 THE COURT: All right. If what your concern is
21 is whether or not ABL has done something with the
22 material that was on the hard drives and then spawned a
23 whole new generation of TETRA out there somewhere, that
24 won't be a problem if it turns out there's nothing on the
25 hard drives.

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1 MR. MEYERS: So I think sequencing these makes
2 sense, yes.

3 THE COURT: Right, right, okay.

4 MR. MEYERS: If that's what -- yes, we would
5 agree to that.

6 THE COURT: What is ICS-Nett laptops?

7 MR. MEYERS: Your Honor, these are, I think,
8 related to the -- one of the issues we've been talking
9 about. These are government-furnished equipment, so it's
10 government laptops. And we had talked with Your Honor
11 about this last time and the -- I think what you had
12 directed the parties to do, which is what the Government
13 had asked, was for ICS-Nett to identify the responsive
14 documents and then the Government would copy them. The
15 problem and issue is that because this is government-
16 furnished equipment, ICS is still using these laptops for
17 other government projects. But ICS-Nett can't search the
18 laptops, they can't copy things off the laptops because
19 it's the government. The equipment has some kind of
20 lock-down aspect. So --

21 THE COURT: Are we talking about laptops that
22 have remained in ICS's possession throughout this whole
23 period?

24 MR. TODOR: Yes. And so it's government-issued
25 laptops that ICS is using, used and contains responsive

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1 materials about DMIX and TETRA and all the issues in this
2 case. But ICS has continued using these laptops for
3 other of its government work. So we served a subpoena --
4 we absolutely think that these are the -- the data that's
5 on these laptops should be part of Your Honor's ruling on
6 the motion to compel and that the Government should
7 request ICS-Nett to provide, you know, the documents
8 responsive to the core set of RFPs that will identify --
9 because these are government -- this is government
10 equipment.

11 What ICS-Nett has said is, look, we can't
12 search these computers and we can't copy these computers,
13 so we don't have a non-incredibly burdensome way of
14 responding to your subpoena. Can't we just give the
15 laptops back to the Government, the Government make
16 images and the Government produce to us the responsive
17 documents, which we thought made a lot of sense. It's
18 sort of what we asked for and I think what Your Honor had
19 ruled in connection with the motion to compel. So I
20 think it's essentially a subset of that issue as it sort
21 of evolved into that.

22 THE COURT: All right. So these are laptops
23 that existed -- they're currently being used, but they
24 existed in the 2012 to '15 time frame?

25 MR. TODOR: They either existed or they have

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1 data on them that was from the -- earlier in 2012 to 2015
2 time frame. That's just (inaudible) these laptops were
3 (inaudible) --

4 THE COURT: The Government's position on that
5 is ICS-Nett, as the party that received the subpoena, has
6 the responsibility to identify responsive documents.
7 That might be one way for the Plaintiff to get at it, but
8 I view the Government's obligation to answer the
9 outstanding discovery request to be its primary concern
10 and perhaps we can kill two birds with one stone.

11 We don't have the issue, therefore, about
12 expired contracts or nonexistent laptops, right?

13 MR. TODOR: For ICS-Nett, no, we hadn't raised
14 that, although we would note that Plaintiffs didn't raise
15 ICS-Nett in their motion to compel, so we weren't
16 briefing, you know --

17 THE COURT: Right.

18 MR. TODOR: -- the issue. The contract -- the
19 Court already ruled whether the contract has expired
20 doesn't matter.

21 THE COURT: Well, let's pretend they did. Is
22 there any reason the Government can't ask for those
23 laptops to be copied and then produced?

24 MR. TODOR: From a technical standpoint, I
25 don't think so. I think there's a reason we couldn't do

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1 it. Our reason we responded the way we did on the JSR
2 was because the previous hearing, the Court had said ICS-
3 Nett -- the Court said, well, I think the Government
4 basically could review the contents of these laptops and
5 make the responsiveness and confidentiality calls, but
6 because Plaintiffs issued ICS-Nett a subpoena (inaudible)
7 that ICS-Nett, you know, should take the first crack on
8 it at least at this time. That's -- but, you know, we
9 cite the Court's transcript.

10 If the Court would prefer for the Government to
11 make a copy of the entire contents of the laptops, which
12 it could, we have two problems. One is ICS-Nett is
13 currently -- the same employees of ICS-nett are using
14 those laptops now on a separate project. So if we were
15 to search using Plaintiff's set of search terms, which
16 are broad search terms, it would appear to be a good
17 likelihood that there will be documents that are not
18 relevant to the case that would come up with a search of
19 the entire contents of the laptop.

20 Someone will need to review the contents of,
21 you know, 12 laptops, a lot of data, to determine, one,
22 what's responsive to the Plaintiff's document request,
23 and two, whether there would need to be a restricted or
24 attorneys' eyes only designation made.

25 THE COURT: Mm-hmm.

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1 MR. TODOR: Our understanding was the Court had
2 ruled that ICS-Nett should be doing that as a first
3 instance rather than the Government and that was the
4 basis for our position.

5 THE COURT: Well, if ICS is taking the position
6 that it cannot search these laptops --

7 MR. TODOR: And my understanding is the reason
8 they said they couldn't search them is because the
9 Government had administrator privileges on the laptops,
10 but they didn't. If the Government -- you know, so they
11 turn them in to the Government, DHA has represented, yes,
12 we can make a copy of these things that can be searched.
13 However, there's the question of who does the searching
14 once that happens. Our proposal was ICS-Nett would
15 advance -- in advance, identify what the responsive
16 portions of the laptops would be, we'd copy those, and
17 then they can review them and produce them.

18 Another alternative would be ICS-Nett turns the
19 entire --

20 THE COURT: Well, let's deal with that one
21 first. How would they know what's responsive?

22 MR. TODOR: They were served with a subpoena
23 from Plaintiffs, so that's what Plaintiffs wanted, which
24 were things like all things involving TETRA, as an
25 example. The Plaintiffs gave them the subpoena.

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1 THE COURT: Is there a way -- is there a way to
2 isolate that so that ICS-Nett is not willy-nilly copying
3 stuff that's either new or totally unrelated or maybe
4 proprietary to somebody else?

5 MR. MEYERS: By copying, Your Honor, you mean
6 making copies of the data that's on their computer? ICS-
7 Nett can't make copies of what's on those laptops.
8 That's part of the issue.

9 THE COURT: Cannot?

10 MR. MEYERS: Cannot. They don't have the
11 technical rights to because it's government-furnished
12 equipment. So they can't search it and they can't copy
13 it. They need the Government --

14 THE COURT: Well, now, hold on. Are we talking
15 about a technical limitation or are we talking about a
16 permission limitation?

17 MR. MEYERS: I think it's a permission
18 limitation that has been implemented technically and that
19 they -- you know, the software security prevents them
20 from --

21 THE COURT: Well, hold on. Is there a way past
22 that problem?

23 MR. TODOR: The way that's been identified is
24 they -- ICS-Nett turns the laptop in to DHA, DHA has the
25 privileges so they can copy the whole contents of the

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1 laptop, and then that image can be searched. That is my
2 understanding of how it can be done from a technical
3 standpoint.

4 THE COURT: So I thought your door number one
5 was to have ICS respond to this, but it sounds like the
6 Government has to unlock the machine in order for that to
7 happen.

8 MR. TODOR: Yes. We have to unlock it. The
9 question is who reads the contents of it -- well, first,
10 the question was, are we unlocking the whole thing or
11 just the portions ICS, looking at their file structure on
12 their hard drives, says, okay, this folder is responsive,
13 emails from this date range are responsive, those are the
14 ones you should copy, and then we'd only copy those
15 parts.

16 Option two is we copy the whole thing, but the
17 ICS-Nett reviews the whole thing to determine what's
18 responsive and what isn't.

19 THE COURT: Because they're in a better
20 position?

21 MR. TODOR: Because -- yes, and they would know
22 what they were working on.

23 THE COURT: Well, I'm inclined to say whether
24 you take option one or two, whichever one makes sense,
25 whichever one happens faster. But it seems to me both

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1 are possible. And if what's required is either an order
2 for me or permission from you saying, in effect, the
3 Court's directed us to do this, so you have permission to
4 copy this, give us a copy.

5 MR. TODOR: Right. My understanding from the
6 Court's previous order was that we were free to copy and
7 we had sent Plaintiffs here's basically the option one
8 that I described to you, here's what I think we should
9 do. ICS -- please have ICS-Nett identify the parts,
10 bring me the laptops and we'll do it. That hasn't
11 happened.

12 So if the Court contemplates -- you know, if
13 the Court is -- doesn't really care whether it's option
14 one or option two just so long as it gets done, we're
15 willing to do either. Our main concern is we can -- I've
16 been told DHA can unlock the laptops and make a copy.
17 Someone has to review the contents of that copy before it
18 gets produced. Our understanding from the Court's ruling
19 at the previous status conference was that when we unlock
20 the thing, that ICS-Nett will determine what's responsive
21 and what isn't.

22 THE COURT: I assume I did that in response to
23 somebody's suggestion or request. I don't care who
24 reviews it. If the Government is in a position to answer
25 that question and say, these files are nonresponsive,

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1 we're going to give Plaintiff access to these, I don't
2 care who does it.

3 MR. TODOR: I understand that, Your Honor. My
4 main concern here is that, you know, Plaintiffs obviously
5 have been quite aggressive in terms of, you know,
6 pursuing documents. We're also trying to deal with a
7 wide range of document issues in response to the Court's
8 orders here, particularly given the timing and given the,
9 you know, 12 laptops contain a huge amount of material,
10 much of which -- you know, if they're working on other
11 projects, it's going to involve, you know, something
12 else, ICS-Nett would be in a better position to determine
13 what's responsive and what isn't than we would be.

14 THE COURT: Fine, have them do it. Like I
15 said, I don't care. It seems to me that the question of
16 relevance is different than going page by page through
17 all the material there and saying it's relevant, but it's
18 protected for some reason. I mean, that I can see it
19 taking a lot of time.

20 MR. TODOR: Right.

21 THE COURT: But if you're looking at just whole
22 groups of files and if obviously stuff is created after a
23 certain date or if it relates to software, the stuff ICS
24 has got going for the DHA that's totally unrelated, why
25 can't that be done sort of on a visual pass-through?

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1 This is the only stuff that appears to be related, copy
2 it, and give it to the Plaintiff.

3 MR. TODOR: Well, I don't know how ICS-Nett had
4 organized the files on those laptops, so I can't answer
5 that question in the abstract.

6 MR. MEYERS: Your Honor, may I? I'm sorry, I
7 didn't mean to --

8 THE COURT: Go ahead.

9 MR. MEYERS: A couple things. One, to clarify,
10 ICS-Nett was a contractor that we explicitly referenced
11 on our motion to compel the Government to produce
12 government contractor documents within the Government's
13 possession, custody or control. We referenced them on
14 pages 2 and 3 of our motion.

15 Two, all of these issues underscore that the
16 Government is the one that has the contractual and
17 practical control over these documents. ICS-Nett can't
18 run searches and can't copy these computers.

19 And, three, the Government essentially is --
20 seems to be farming out -- wants to farm out its party
21 discovery obligations to a nonparty. ICS-Nett has
22 produced documents that are, I think, true third party
23 documents, as have others. But what we've heard from a
24 lot of these contractors and what led us to file this
25 motion is these computers are the Government's computers.

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1 We returned these to the Government. They're the ones
2 that --

3 THE COURT: Well, these were not returned.

4 MR. MEYERS: They're not. These ones --
5 they're still working on them. But they can't -- they
6 can't search and copy the documents and, frankly, the
7 Government is the one --

8 THE COURT: How can they use them if they can't
9 search them?

10 MR. MEYERS: I'm sorry?

11 THE COURT: How can they use them if they can't
12 search them?

13 MR. MEYERS: I don't -- I don't know. I mean,
14 I'm just reporting what's been told to me and Mr. Todor
15 has seen the same in correspondence from the in-house
16 counsel at --

17 THE COURT: All right, well, look, in two
18 weeks, what I would like to know is what the status of
19 this is. I'm not saying that the production has to have
20 taken place, but I do want a solution to this little
21 problem.

22 MR. TODOR: Understood, Your Honor.

23 THE COURT: Okay. Additional email custodians,
24 have we talked about that?

25 MR. MEYERS: Yes, we have talked about that,

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1 Your Honor.

2 THE COURT: All right.

3 MR. TODOR: Your Honor, with respect to that
4 issue, Plaintiffs haven't said like how many custodians
5 they're talking about. In reference to the earlier
6 discussion involving subcontractor or contractor
7 employees, in terms of Plaintiff's issue they've raised
8 involving TST files and -- TST files and email,
9 particularly with respect to the employee that they've
10 raised, they wish to designate custodians to see whether
11 the Government has email searches on its servers for
12 those employees who are willing to do that in order to
13 produce whatever the Court feels we should be producing
14 with respect to subcontractors even though, you know, we
15 previously made the preservation order to them.

16 THE COURT: So what you need is the names?

17 MR. TODOR: Yes.

18 MR. MEYERS: We'll get him those names.

19 THE COURT: Okay.

20 MR. MEYERS: This week, today, tomorrow.

21 THE COURT: Attorneys' eyes only, was that --
22 as I understand it, there's a fair number of documents
23 that are attorneys' eyes only. Unless you're at a point
24 in your manipulating or using that information that makes
25 it too awkward because you can't discuss it with your

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1 client, I'm inclined to wait on resolving that. But in
2 order to resolve it, what I would propose to do later,
3 not now, is a random sample of those documents and have
4 me look at them and see why they're being labeled as
5 attorneys' eyes only. But we can do that later.

6 MR. TODOR: Understood, Your Honor. We also --
7 we are considering Plaintiff's proposal -- Plaintiffs
8 initially proposed, you know, one employee of their
9 client to be able to review the attorneys' eyes only as a
10 way of getting around it. That person's title is chief
11 strategy officer, so, you know, the things are about, you
12 know, what the Government's acquisition plans are that
13 some of these officials may have, we don't think a
14 strategy officer should have --

15 THE COURT: A fox in the henhouse?

16 MR. TODOR: If they point me to individual
17 documents they don't think that -- you know, we're more
18 than willing to consider it. If they identify ones they
19 think ought not to have that designation, you know, we'll
20 deal with that per the protective order. We think it's a
21 reasonable suggestion from the Court to deal with that
22 issue somewhat later as depositions approach.

23 THE COURT: Okay. What else is hanging fire?
24 It seems like I've got to do something else.

25 MR. TODOR: The Court has instructed the

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1 Government to go to these third parties to turn over what
2 the -- is called for by the contract. The Court had
3 raised the issue of whether that would include basically
4 the full scope of Plaintiff's document requests, what is
5 designed in the contract that might be over or under-
6 inclusive compared to Plaintiff's document requests, or a
7 subset of Plaintiff's document requests. Does the Court
8 have any further guidance on that question?

9 THE COURT: Well, I thought that Plaintiff's
10 counsel said they would be willing to work with you on
11 being specific in terms of what they think is within the
12 contract. And so I'm assuming that -- I was trying to
13 avoid characterizing it myself. Did I make that offer or
14 did you all make that offer?

15 MR. O'BEIRNE: We did, Your Honor. We
16 understood you to accept that we would meet and confer.

17 THE COURT: Okay. That's probably about a
18 fourth reason that -- let's reconvene in a couple of
19 weeks by telephone.

20 Go ahead.

21 MR. TODOR: I'd just like to try to run down to
22 make sure I understand what it is that the Court needs us
23 to confer on or instruct everyone to do before we
24 reconvene in two weeks. Would that be possible?

25 THE COURT: That's a great idea. I'm not --

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1 I'm probably not going to be able to help you, but --

2 MR. TODOR: So first, I have the Government is
3 to meet and confer with Plaintiffs and to reach out to
4 the third party prime contractors, which would be within
5 the scope of Plaintiff's motion to compel to have them
6 produce to the Government documents that would have been
7 under those contracts to produce.

8 THE COURT: Despite the fact that they're
9 closed contracts, right?

10 MR. TODOR: Right, notwithstanding that.

11 THE COURT: Okay.

12 MR. TODOR: My understanding is the Court's
13 order would speak to that issue, which might be
14 helpful -- for example, Deloitte, in its letter that they
15 sent to Plaintiffs says, well, we have no responsive
16 documents and here's 22 separate objections we have to
17 your subpoena anyway. If the Court is putting the --
18 basically the Government in the position of being the
19 document collector, it may be helpful --

20 THE COURT: Okay.

21 MR. TODOR: -- in terms of dealing with the
22 third parties to have a court order that we are
23 instructed to do that.

24 THE COURT: All right.

25 MR. TODOR: Second, on the 30(b)(6) deposition,

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1 was to be on record management questions and that the
2 Plaintiffs were preparing a notice for that and that the
3 Government was to identify witnesses to testify to that.
4 My understanding at this time is that it may not be one
5 person because it may need to be one person from the
6 Rosslyn and one person from the San Antonio facilities.

7 THE COURT: Right. And it may have to happen
8 more than once given the fact that I'm allowing it to
9 occur before document production is complete.

10 MR. TODOR: Okay. Does the Court have a
11 preference in terms of time frame for that to be
12 accomplished?

13 THE COURT: Well, like tomorrow, but that's not
14 going to work. I don't know. I'm assuming that you all
15 are going to have to have a fair number of conversations
16 in the next couple of days. I will just leave that with
17 you folks. I would like to see that happen sooner rather
18 than later. I believe what I said when we were talking
19 about this, that I wasn't -- I was going to suggest that
20 that happen before that narrowed production of emails
21 occurred.

22 MR. TODOR: Okay. That was to be my next
23 question. The email productions, there was the October
24 13th deadline that was sent by the Court.

25 THE COURT: Mm-hmm.

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1 MR. TODOR: My understanding is --

2 THE COURT: Was that in print?

3 MR. TODOR: It was in the Court's order of, I
4 think, September 11th.

5 THE COURT: Okay.

6 MR. TODOR: My understanding from what the
7 Court said today is that the Government was to prioritize
8 preparation for the 30(b)(6) deposition and whether our
9 IT contractors, who are also the ones working on the
10 emails, are able to access the DTC server copy hard
11 drives before the email search, but we're to proceed as
12 expeditiously as we could on all three fronts.

13 THE COURT: Yes. Although I think what I said
14 was that -- you said there were three tranches of
15 potential email sources of material there.

16 MR. TODOR: Yes.

17 THE COURT: And you said one looked more likely
18 to be fruitful than the rest.

19 MR. TODOR: Yes.

20 THE COURT: And I'm assuming in the next two
21 weeks that the three -- four of you, whatever number of
22 you, will have negotiated a narrowed down search list and
23 you'll have some idea by then what that's going to
24 produce.

25 MR. TODOR: Understood, Your Honor.

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1 THE COURT: Okay?

2 MR. TODOR: Okay, so for the DHA Legacy
3 tranche.

4 MR. MEYERS: We expect to do that, yes, Your
5 Honor.

6 THE COURT: Mm-hmm.

7 MR. O'BEIRNE: And, Your Honor, we're willing
8 to work simultaneously with the Government on all these
9 issues, getting them the updated terms, the discussions
10 on the 30(b)(6), et cetera.

11 THE COURT: Right, I would assume that you all
12 can multitask even though perhaps some of the data
13 gatherers won't be able to.

14 MR. TODOR: Okay. And then on the DTC hard
15 drives, we are to prioritize whether we, the Government,
16 are able to access them and to coordinate whatever we
17 need to do in terms of both the contracting officers and
18 ICS-Nett to determine how the parties can access those
19 hard drives.

20 THE COURT: This is that batch that went off to
21 West Virginia?

22 MR. TODOR: Yes, or that were used to transfer
23 things to West Virginia, yes.

24 THE COURT: Right. And, again, that's -- that
25 doesn't seem unreasonable since it's -- in effect, you're

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1 asking a different set of people to confirm the code,
2 that it's accessible.

3 MR. TODOR: Okay.

4 THE COURT: All right.

5 MR. TODOR: And on the ICS-Nett drives, DHA is
6 to basically unlock and create the images and arrange for
7 the files to be in a condition to where they can be
8 reviewed for responsiveness by ICS.

9 THE COURT: Again, I don't care whether you do
10 it or ICS does it as long as it gets done. And -- right.

11 MR. TODOR: Okay.

12 THE COURT: Is that it? I keep hoping for some
13 indication that the game is worth the candle. This is
14 nothing more than an observation, but you folks are
15 spending an enormous amount of effort and presumably
16 money. I just hope that it's worth the effort.

17 The other thing I was going to raise with you
18 is the -- I think I brought this out last time and I
19 don't remember actually resolving it. But would it be
20 useful for the parties if I denied, without prejudice,
21 the motion to dismiss?

22 MR. MEYERS: We think it would be, Your Honor,
23 yes.

24 THE COURT: Hmm?

25 MR. TODOR: Well, we haven't withdrawn the

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1 motion, so, no, we don't. That's not our position that
2 the Court -- that the motion should be denied.

3 MR. MEYERS: It's driving an artificial
4 schedule problem because the -- we can get all of this
5 done by the April 1st deadline for all fact discovery.
6 I'm confident that we can. And so it's a question of the
7 discovery (inaudible) documents and the depositions that
8 would go to the issue of the motion, which is currently
9 set -- that cut-off is currently December 1st.

10 And so if the Government wants to renew -- you
11 know, file a summary judgment motion after, you know, the
12 normal sequence of events, we're done with discovery,
13 we've got facts, we've got experts, and they say, all
14 right, you know, we want to get rid of part of the case,
15 file summary judgment -- partial summary judgment. That
16 would be, I think, one approach.

17 THE COURT: Well, I think Mr. Todor's point is
18 that, absent putting something in front of me that
19 suggests that there's some -- that I can't grant the
20 motion in full, even if it's a partial motion, probably
21 I'm limited to merely postponing your response to it.
22 But I don't mind. Have I put in an order that December
23 cut-off date for discovery related to authority?

24 MR. MEYERS: Yes.

25 MR. O'BEIRNE: The current scheduling order has

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1 December 1st as the cut-off of jurisdictional -- of
2 authorization, consent and discovery, jurisdictional
3 discovery.

4 MR. MEYERS: And I think our opposition to the
5 motion is due January 3rd.

6 MR. O'BEIRNE: January 3rd.

7 THE COURT: Ah. Well, I guess my thought is
8 that I would simply postpone the -- link up discovery
9 generally with discovery on authority and postpone your
10 obligation to respond until after whatever the April
11 deadline is.

12 MR. TODOR: Your Honor, if the Court wishes to
13 defer its consideration of the motion to dismiss, that's
14 the Court's prerogative. That would tie up somewhat in
15 the issue of the SMS production. SMS is one of the
16 contractors that Plaintiffs are seeking documents from in
17 the motion to compel.

18 THE COURT: Mm-hmm.

19 MR. TODOR: In our response, we had noted that
20 SMS had only produced documents that were pertinent to
21 the jurisdictional discovery issues it said at the --
22 when Plaintiffs had filed the motion to compel that the
23 Court denied this May.

24 THE COURT: Mm-hmm.

25 MR. TODOR: If the Court is changing the

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1 discovery plan such that there would be no limitation on
2 the discovery to only being on the authorization and
3 consent question, and that all discovery would proceed
4 until the April 2nd deadline because the Court was
5 deferring consideration of our motion to dismiss, that
6 may change the scope of things in terms of what SMS's
7 production may be.

8 It may also simplify matters in terms of our --
9 since the Court has ordered us to request SMS's contract
10 files basically pertinent to this case, SMS had earlier
11 resisted Plaintiff's subpoena and motion to compel
12 saying, well, all we're under an obligation to do is give
13 things on authorization and consent. If it is the
14 Court's intent to alter that, it would probably be
15 productive to place that in the Court's order so as to
16 clarify matters when we go to SMS.

17 THE COURT: Okay. I'll do that.

18 MR. MEYERS: We would agree with that.

19 Your Honor, may I ask one point? On our
20 opposition to the motion to dismiss, my clients may
21 decide, after we get the documents and maybe some of the
22 depositions, that they'd like a resolution of that issue
23 earlier rather than later to try and narrow the issues in
24 this case and figure out, as you've said, what is at
25 stake and what isn't. And so I guess we would like at

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1 least the ability to file a motion -- or opposition
2 earlier, but not necessarily be required to. In other
3 words --

4 THE COURT: Right. Well, that would -- I don't
5 have any problem with that. And we can talk about the
6 Government's obligation to reply at that point.

7 MR. MEYERS: Sure. We would work with the
8 Government on a briefing schedule if we decide that we
9 can file it in January or February rather than waiting
10 until April or May.

11 THE COURT: Mm-hmm, right.

12 MR. MEYERS: I think all the parties would
13 probably be interested in a resolution sooner rather than
14 later if it's on the appropriate record.

15 THE COURT: On a sufficient record, although
16 that may only ratchet in one direction. Well, of course,
17 the motion only runs in one direction.

18 Okay, anything else?

19 MR. TODOR: I think those were the listing of
20 issues that were pending. With respect to the motion, as
21 the Court notes, if the Court is altering the discovery
22 plan -- I mean, one of the purposes of the motion to
23 dismiss was to narrow the issues for discovery, since the
24 Court apparently is saying, well, the Court's not
25 narrowing the issues for discovery, then Plaintiffs may

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1 desire to move. But I don't know that it would change
2 what the parties would really be doing in terms of
3 discovery no matter when the Court were to receive
4 briefing or to decide that motion, although we certainly
5 agree to be resolved prior to any -- you know, certainly
6 at the end of discovery, the issues should be dissolved
7 so the parties know what the issues that remain in the
8 case are.

9 THE COURT: I'm not exactly sure what you're
10 suggesting.

11 MR. TODOR: Plaintiffs have said they might
12 want to file their response early.

13 THE COURT: Right.

14 MR. TODOR: We're not sure that would do much
15 in terms of narrowing the issues for discovery because
16 the Court has said, well, the Court's not going to narrow
17 the issues for discovery --

18 THE COURT: Oh, I don't think that's the
19 purpose of it. I think the purpose of it is to eliminate
20 some of the ambiguity in the lawsuit. In other words, I
21 think --I'm assuming that if the Plaintiffs are correct,
22 it would be sufficient to meet the motion to say that
23 there's some evidence that the Government was aware
24 beyond whatever it's conceded already in terms of
25 authorization. That would be enough to deny the motion,

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1 right?

2 MR. MEYERS: We certainly think that and
3 we have definitely seen that in the documents, Your
4 Honor.

5 THE COURT: Right. So, I mean, I don't think
6 it would have any impact one way or the other on
7 discovery. You'd still have to go through the drill
8 largely. The reason I thought initially that segregating
9 discovery might be useful is because I thought
10 authorization and consent could be teased out as sort of
11 a separate proof. It's obvious to me that it's just
12 wrapped around the axle with general discovery and
13 damages or use -- extent of use, that kind of thing. So
14 I don't see there's much to be gained by maintaining that
15 segregation of discovery.

16 I tell you what I may do -- normally, I don't
17 do this, but what we may do is email you a draft of the
18 scheduling order to make sure that I've covered what you
19 think we've discussed today. And if you have any
20 suggestions, I'm not looking for tweaking on
21 irrelevancies, but just to make sure that I'm capturing
22 what I think I've told you folks.

23 MR. MEYERS: That's all we have, Your Honor.

24 THE COURT: Okay.

25 MR. TODOR: That's it, Your Honor.

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1 THE COURT: Thank you. We're adjourned.
2 (Whereupon, at 3:49 p.m., the hearing was
3 adjourned.)
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1 CERTIFICATE OF TRANSCRIBER

2

3 I, Elizabeth M. Farrell, court-approved
4 transcriber, certify that the foregoing is a correct
5 transcript from the official electronic sound recording
6 of the proceedings in the above-titled matter.

7

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9

10 DATE: 10/13/2017

S/Elizabeth M. Farrell

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ELIZABETH M. FARRELL, CERT

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